86-1313

Supreme Court, U.S.
FILED
JAN 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

UNITED STATES SUPREME COURT

JANUARY 1987 TERM OF COURT

DANIEL J. SHAPIRO,

Appellant,

-against-

MARGARITA ROSA,

Respondent.

ON A PETITION OF A WRIT OF CERTIORARI FROM A DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK UPON A DENIAL OF REVIEW OF ORDERS BY THE APPELLATE DIVISION AND FAMILY COURT OF NEW YORK STATE.

Counsel for Appellant:
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(914) 638-3450

Counsel for Respondent:
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New York, New York 10017
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A. QUESTIONS PRESENTED FOR REVIEW

1) Whether Constitutional due Process was violated by the Trial Court's issuing an order on an ex-parte application which changed the custodial parent.

2) Whether the issuance of a judicial order changing the custodial parent without prior notice or hearing violated the Constitutional Due Process Rights of the adversely affected parent.

3) Whether the issuance of a judicial order changing the custodial parent without prior notice or a prior hearing, and terminating the adversely affected parents' ability to have contact with the child violated the Constitutional Due Process Rights of the adversely affected parent.

B. THE PARTIES

All the parties to the proceeding in the Court whose judgment is sought to be reviewed are listed in the caption.

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C2. TABLE OF AUTHORITIES

Cases

Bell v. Burson, 402 US 535 (1971).....

Fuentes v. Shevin, 407 US 67 (1972).....

Goldberg v. Kelly, 397 US 254 (1970).....

Lassiter v. Department of Social Services, 452 US 18 (1981)...

Morrisey v. Brewer, 408 US 471 (1972).....

Roe v. Wade, 410 US 113 (1973)....

Santosky v. Kramer, 455 US 745 (1982).....

Stanley v. Illinois, 405 US 645 (1972).....

Twining v. New Jersey, 211 US 78..

Wisconsin v. Yoder, 406 US 205 (1972).....

CONSTITUTIONAL PROVISION

U.S. Const., Am. XIV, Sec. 1

STATE JURISDICTIONAL STATUTE

New York State Family Court Act, Section 651

D. THE REPORTED OPINIONS BELOW

None of the opinions issued below are believed to be reported. All orders and opinions of the lower courts are reprinted in Part J of this petition (ie, the Appendix), infra.

E. JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked pursuant to 28 USC 1257(3).

(i) The last decree issued below was issued by the New York State Court of Appeals on October 9, 1986. Said decree denied leave to appeal based upon jurisdictional grounds that the Order sought to be appealed did not finally determine the underlying proceeding.

Previously the Appellate Division of the New York State Supreme Court denied leave to appeal from the Order giving rise to the constitutional issues herein, holding such "academic".

The Family Court of the State of New York issued an order on an ex-parte application of respondent herein which changed the custodial parent of the child of the marriage.

As indicated, said order was issued without prior notice or a prior hearing to the adversely affected parent.

ii) Jurisdiction of this Court to review the subject decree by writ of certiorari is 28 USC 1257(3). The subject order, although a temporary order in the procedural scheme of New York, is reviewable by this Court since review by the New York Courts of the subject order has been exhausted in relation to the issue of the application of procedural due process to such temporary orders affecting substantial rights.

F. CONSTITUTIONAL PROVISIONS

The constitutional provision involved herein is the due process requirement of Section 1 of the Fourteenth Amendment to the United States Constitution. Said section reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE JURISDICTIONAL STATUTE

Sec. 651(b) reads:

"When initiated in the family court, the family court has jurisdiction to determine, with the same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody of minors."

G. STATEMENT OF FACTS

On December 30, 1985, respondent made an ex-parte application to the Family Court of the State of New York by order to show cause commencing a custody proceeding and seeking a determination of custody of the minor child of the marriage between appellant and respondent.

At the time of said ex-parte application, appellant father had physical custody of the child,* which the Family Court was aware of at the time respondent submitted her ex-parte application.

Pursuant to said ex-parte application of respondent, and without rior notice or a prior hearing, the Family Court changed the custodial parent by granting

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* At said time, there was no judicial order granting custody to either parent.

respondent custody of the minor child.*

In so issuing such an order and changing the custodial parent without notice or a prior opportunity to respond, the Family Court violated appellants constitutional due process rights.

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* Said order provided no visitation rights to the father and scheduled a hearing almost three weeks after issuance of said order.

Respondent took the child from appellant pursuant to said order on the evening of the day the order was issued.

H. STAGE OF PROCEEDINGS IN STATE COURT

State Trial Level:

The proceedings in State Court are still in the pre-trial stages. No hearing on the Family Court's custody order has ever been held.* The Family Court custody proceeding has been consolidated with a matrimonial action between the parties hereto which is pending in the New York State Supreme Court.**

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* The Family Court refused to go forward with any proceedings until issues involving consolidation and changes of venue were resolved in the related matrimonial action pending in the New York State Supreme Court.

** The Supreme Court, upon consolidation seven months after the commencement of the Family Court proceeding, merely continued the order of the Family Court. No hearing was held on such.

State Appellate Level:

On the day following the issuance and service upon appellant of the subject Family Court Order (ie, December 30, 1985), appellant herein, by order to show cause, moved for leave to vacate and appeal the Family Court order.

Upon said application, appellant asserted that the order of the Family Court violated appellant's constitutional due process rights under both the State and Federal Constitutions by failing to provide for prior notice and a hearing prior to changing the custodial parent. (See Appendix herein, page 19).*

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* While the Appellate Division immediately amended the Family Court Order to provide for visitation by the appellant, it did not require an immediate hearing on the custody issue.

The Appellate Division did not address the issue, holding that (a) the appeal was "academic", because the first calendar date for the appellant to appear in Family Court had arrived, and (b) leave to appeal was thus being denied. (See Decision and Order in Appendix portion reof, page 19).

Appellant then moved for leave to appeal to the New York State Court of Appeals, the highest court in the State of New York, based upon the failure of the Appellate Division to address the constitutional issues. Leave to appeal was denied. (See Appendix herein, page 19).

Upon such denial, appellant moved for leave to appeal at the Court of Appeals on the same constitutional due process issues. The Court of Appeals

denied leave to appeal on the basis that said court had no jurisdiction to hear said appeal because the subject order did not "finally determine" the Family Court proceeding. (See Appendix herein, page 19).

I. ARGUMENT FOR GRANTING WRIT

The issues to be raised on the appeal to this Court involve significant due process rights under the Fourteenth Amendment to the United States Constitution, which the state courts have violated and ignored.

It is well recognized that in a variety of settings the parent-child relationship is entitled to constitutional due process protection from arbitrary State infringement actions, See, EG, Stanley v. Illinois, 405 US 645 (1972); Santosky v. Kramer, 455

US 745 (1982); Wisconsin v. Yoder, 406 US 205 (1972; Lassiter v. Department of Social Services, 452 US 18 (1981); particularly the due process rights of prior notice and a prior hearing. EG, Goldberg v. Kelly, 397 US 254 (1970); Twining v. New Jers- 211 US 78; Bell v. Burson, 402 US 535 (1971); Morrisey v. Brewer, 408 US 471 (1972); Fuentes v. Shevin, 407 US 67 (1972).

Yet under the circumstances of this matter, (a) the Family Court of the State of New York changed the custodial parent without requiring prior notice or a prior hearing on the issue of custody, (b) the Appellate Division refused to (i) rule on either the State or Federal due process issues or (ii) require an immediate hearing on said issue, and (c) the New York State Court of Appeals denied review of the due

process issues on a state-imposed jurisdictional limitation.

Without a review and determination on the due process issues raised herein, the Family Court practice giving rise to this petition will continue,* as will the violation of Constitutional Due Process rights.**

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* At the conference on December 30, 1985 with Justice Kassal of the Appellate Division, respondent's attorney had stated to Justice Kassal that the Family Court "does it all the time" in response to a question as to whether the issuance of the subject order was proper.

** It is noted, again, that despite the passage of more than a year since issuance of the subject Family Court order, no hearing has ever held on the issue.

The writ petitioned for herein should be granted so as to allow this Court to determine whether it is necessary to direct the Family Court of the State of New York to discontinue and refrain from issuing orders changing the custodial parent without providing for prior notice or a prior or immediate hearing.*

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* It is noted that the "avoidance rule" of Roe v. Wade, 410 US 113 (1973) is applicable here: a situation in which repetition of constitutional violations is likely but will probably evade review because of the passage of time and an eventual hearing date. As a result of the decisions of the New York Courts, procedural due process is not applicable to temporary custody determinations.

J. APPENDIX

The following appended documents constitute the relevant opinions and orders relating to this petition:

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-Orders of Appellate Division Denying Appeal	26
-Order of Appellate Division Denying Leave to Appeal To Court of Appeals	30
-Order of Court of Appeals Denying Leave to Appeal	32

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ORDER TO SHOW CAUSE/FAMILY COURT

At a term of the Family Court of the State of New York, held in and for the County of New York at 60 Lafayette Street, New York, New York on December 30, 1985

PRESENT:
HON. Sara P. Schechter
Judge

In the Matter of a Proceeding for the Custody and/or Visitation of Minors Under Article 6 of the Family Court Act

MARGARITA ROSA

Petitioner,

-against-

DANIEL JUDD SHAPIRO

Respondent.

Docket No. V 5970/85

ORDER TO SHOW CAUSE PURSUANT TO SECTION 651 OF THE FAMILY COURT ACT

Part 4, Ninth Floor

Upon the Petition of MARGARITA ROSA, verified the 30th day of December, 1985

annexed hereto:

Let the Respondent DANIEL JUDD SHAPIRO Show Cause at a term of this Court to be held ____ NY FC _____ located at 60 Lafayette Street, New York, New York, on the 16th day of January, 1986 at 9:30 o'clock in the forenoon thereof or as soon thereafter as Counsel can be heard, why an Order should not be made pursuant to Section 651 of the Family Court Act awarding custody and/or visitation to the Petitioner, and why Petitioner should not have such other and further relief as the Court may determine and it is

ORDERED,

SUFFICENT REASON APPEARING THEREFOR, let personal service of a copy of this Order, together with the papers upon which it was granted, upon Respondent on or before the 10th day of January 1986, be deemed

sufficient service.

ENTER:

s/ Sara P Schechter
J. F.C.

12/30/85

ORDER OF CUSTODY/ FAMILY COURT

23

At a term of the Family Court of the State of New York, held in and for the County of New York at 60 Lafayette Street, New York, New York on December 30, 1985 1985

PRESENT:
HON. SCHECHTER
Judge

In the Matter of a Proceeding for the Custody and/or Visitation of Minors Under Article 6 of the Family Court Act	Docket No. V 5970/85
MARGARITA ROSA Petitioner, -against-	Temporary Order Directing Custody or Visitation of Minors Pursuant to Section 651 of the Family Court Act
DANIEL JUDD SHAPIRO Respondent.	Child: Marisol K. Rosa Shapiro

The Petitioner herein having moved by Petition and Order to Show Cause dated the 30th day of December, 1985, for an Order pursuant to Section 651 of the Family

Court Act of the State of New York awarding custody of the minor child(ren), and the said Petition and Order to Show Cause, having been served upon the Respondent in the manner set forth in the said Order to Show cause as appears in the affidavit of service annexed thereto; and the said Petition and Order to Show Cause having duly come on to be heard.

And the Petitioner having appeared (by Counsel) (in person) in support of said petition; the Respondent having appeared by (Counsel) (in person) in opposition thereto and the child(ren) having been represented by Counsel assigned by the Court and the matter having been duly heard

Now, after due deliberation and upon all the pleadings and proceedings herein; it is

ORDERED , ADJUDGED AND DECREED that Temporary Order of Custody To Petitioner

ENTER: s/ Sara P Schechter
J.F.C.

APPELLATE DIVISION ORDER DENYING APPEAL

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of a Proceeding for the Custody and/or Visitation of Minors Under Article 6 of the Family Court Act

M-6770A

Docket No. V 5970/85

MARGARITA ROSA,

Petitioner,

-against-

DANIEL JUDD SHAPIRO,

Respondent,

----------x

Respondent having moved this Court for an order staying execution and enforcement of the order of the Family Court of the State of New York, New York County, entered on December 30, 1985, pending hearing and determination of his appeal taken therefrom,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in

support of the motion and those in opposition or in relation thereto, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied as academic. (See M-6770, decided simultaneously herewith.)

S/
LEONARD H. SANDLER
Associate Justice

Dated: January 16, 1986

At a term of the
Appellate Division of the
Supreme Court held in
and for the First
Judicial Department in
the County of New York
on January 16, 1986

Present: Hon. FRANCIS T. MURPHY
Presiding Justice

LEONARD H. SANDLER
ARNOLD L. FEIN
E. LEO MILONAS
BETTY WEINBERG ELLERIN
Justices

In the Matter of a
Proceeding for the
Custody and/or Visitation
of Minors under Article
6 of the Family Court
Act

M-2373

Docket No.
V 5907/85

MARGARITA ROSA,

Petitioner,

-against-

DANIEL J. SHAPIRO,

Respondent.

Respondent having moved this Court for

an order granting him leave to appeal from an order of the Family Court of the State of New York, New York County, entered on December 30, 1985,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of the motion and those in opposition or in relation thereto, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied. (See M-6770A, decided simultaneously herewith.)

ENTER: s/ HAROLD J. REYNOLDS
Clerk

BEST

APPPELLATE DIVISION ORDER DENYING LEAVE TO APPEA
APPEAL TO HIGHEST STATE COURT

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At a term of the
Appellate Division of the
Supreme Court held in
and for the First
Judicial Department in
the County of New York
on June 12, 1986

Present: Hon. FRANCIS T. MURPHY
Presiding Justice

LEONARD H. SANDLER
ARNOLD L. FEIN
E. LEO MILONAS
BETTY WEINBERG ELLERIN
Justices

In the Matter of a
Proceeding for the
Custody and/or Visitation
of Minors under Article
6 of the Family Court
Act

M-2373

Docket No.
V 5907/85

MARGARITA ROSA,

Petitioner,

-against-

DANIEL J. SHAPIRO,

Respondent.

The respondent having moved for leave to appeal to the Court of Appeals from

AVAILABLE COPY

two orders of this Court (M-6770 and M6770A) entered on January 16, 1986,

Now upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and those filed in opposition or in relation thereto, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied.

ENTER:

s/ HAROLD J. REYNOLDS

CLERK

ORDER DENYING LEAVE TO APPEAL BY HIGHEST STATE COURT

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court of Appeals Hall in the City of Albany on the 9th day of October A.D. 1986

PRESENT: Hon. Sol Wachtler
Chief Judge, presiding

1-12 Mo. No. 896

MARGARITA ROSA,

Respondent,

-against-

DANIEL J. SHAPIRO,

Appellant.

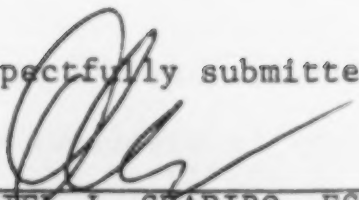
A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the grounds that the order sought of the Appellate Division to be appealed from does not finally determine the action within the meaning of the Constitution and the order of the Associate Justice of the Appellate Division is not an appealable order (CPLR 5602[a][1][i].

S/

Donald M. Sheraw
Clerk of the Court

Respectfully submitted,



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